LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: C.L. v. Allstate Insurance Company, 2020 ONLAT 19-005570/AABS

Released Date: 07/29/2020
File Number: 19-005570/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Cindy L. McLuhan

Applicant

and

Allstate Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam**

APPEARANCES:

For the Applicant: Lisa Bishop
Counsel

For the Respondent: Heather Kawaguchi
Counsel

HEARD: **By Way of Written Submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant Cindy McLuhan ("applicant"), was involved in an automobile accident on June 20, 2017 ("accident") and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). [1] The applicant was 52 years of age at the time of the accident. The applicant was denied certain benefits by the respondent Allstate Insurance Company ("respondent") and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The respondent determined the applicant's injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule* and therefore fall within the Minor Injury Guideline ("MIG")[2] and, even if the MIG is found not applicable, the applicant is not entitled to the disputed treatment plans because they are not reasonable and necessary. The applicant has received benefits to the full limits of the MIG. The applicant has applied to the Tribunal for dispute resolution.

ISSUES

[3] The issues to be decided in this hearing are:

i. Are the applicant's injuries predominantly minor injuries as defined in s. 3 of the *Schedule,* subject to treatment within the $3,500.00 limit in the Minor Injury Guideline?

ii. Is the applicant entitled to receive a medical benefit in the amount of $1,349.00 for physiotherapy treatment, recommended by Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted August 22, 2017 and denied by the respondent on September 8, 2017?

iii. Is the applicant entitled to receive a medical benefit in the amount of $2,132.00 for physiotherapy treatment, recommended by Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted November 6, 2017 and denied by the respondent on November 28, 2017?[3]

[1] O. Reg. 34/10.
[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued under s. 268.3(1.1) of the *Insurance Act.*
[3] The Tribunal's case conference Report dated December 6, 2019 filed by the applicant confirms that issue ii was withdrawn at the case conference and is not before me. The respondent agrees.

iv. Is the applicant entitled to payments for the cost of examinations in the amount of $2,198.79 for a psychological assessment, recommended by Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted May 14, 2019 and denied on July 25, 2019?

v. Is the applicant entitled to payments for the cost of examinations in the amount of $2,220.00 for an orthopaedic assessment, recommended by Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted May 14, 2019 and denied on May 30, 2019?

vi. Is the applicant entitled to interest on any overdue payment of benefits?

vii. Is the applicant entitled to an award under Ontario Regulation 664 ("special award") because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

[4] The applicant sustained minor injuries as defined under the *Schedule* and is subject to the $3,500.00 funding limit which has already been expended. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is owed. There is no special award.

LAW

The Minor Injury Guideline

[5] The MIG establishes a treatment framework available to an injured person who sustains a "minor injury" as a result of an accident. A "minor injury" is defined in section 3(1) of the *Schedule* as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury". Under section 18(1) of the *Schedule*, injuries that are defined as a "minor injury" are subject to a $3,500.00 funding limit on treatment.

[6] To be eligible for treatment above the $3,500.00 funding limit, the applicant must establish that her impairments sustained in the accident are not predominantly minor, or produce compelling evidence, provided by a health practitioner that was documented before the accident, that the applicant has a pre-existing condition that will prevent her from achieving maximal recovery from the minor injury if subject to the funding limit.

[7] The onus is on the applicant to show, on a balance of probabilities, that his or her injuries fall outside of the MIG.[4]

ANALYSIS

[8] I find based on the evidence before me that the applicant has not met her burden to establish that her physical injuries fall outside the MIG. Although the applicant argues that her physical injuries are not within the MIG, the weight of the evidence does not support this. The June 20, 2017 ambulance call report records that the applicant was in a "very minor" accident, was having anxiety but no other complaints, was ambulatory, "denies injury" and was "unsure initially if she wanted to go to hospital". At Lakeridge Health Hospital the applicant's stated complaint was "anxious post mvc" and her chief complaint was noted as "anxiety/situational crisis". The applicant was discharged with a pain prescription. These records indicate physical injuries which would fall within the MIG.

[9] The applicant started physiotherapy at Oshawa Physiotherapy and Rehabilitation Centre ("Oshawa Physio") two days after the accident. The OCF-3, Disability Certificate, completed on June 22, 2017 by Dr. Mangoharan, the applicant's chiropractor, lists her injuries as whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal signs, sprain and strain of shoulder joint, rotator cuff capsule, injury of long flexor muscle and tendon of thumb at wrist and hand level, headache and "other and unspecified abdominal pain". These records indicate physical injuries which would fall within the MIG. To the extent that the various treatment plans suggest otherwise, these are not persuasive as they do not contain medical diagnoses.

[10] The applicant did not seek medical help from Dr. Barker at Glazier Medical Centre, her family doctor, until some six weeks after the accident. On the first post-accident visit on July 31, 2017, the applicant did not complain of thumb pain to Dr. Barker. Dr. Barker diagnosed "bilateral rotator cuff syndrome, neck strain" and noted that she will continue with physiotherapy for now and continue off work. On August 21, 2017, the applicant complained of ringing in her ears since the accident as well as hearing loss and pain in her right thumb with flexion and has pain limited range of motion and loss of strength. Dr. Barker noted "tender thumb at MCP joint as well as IP joint right side. At this second visit, the applicant reported her right shoulder was improved with almost full range of motion. Dr. Barker's records indicate physical injuries which would fall within the MIG.

[4] *Scarlett v. Belair*, 2015 ONSC 3635 (Div. Ct.) para 24.

[11] On August 21, 2017, Dr. Barker referred the applicant to Dr. Ho, an ear, nose and throat specialist, who diagnosed whiplash injury with right tinnitus. I find this is predominantly a minor injury.

[12] Dr. Dessouki, the applicant's orthopaedic surgeon, in June 2019 diagnosed the applicant's accident-related injuries as cervical myofascial strain/sprain injury, full thickness tear of the subscapularis and partial thickness tear of the distal supraspinatus tendon of the right shoulder and right thumb strain/sprain injury. Dr. Dessouki recommended x-rays of the cervical spine and right thumb. Dr. Dessouki's conclusion is unpersuasive and unreliable for several reasons and I give it little weight. Firstly, for his diagnosis of full thickness tear, Dr. Dessouki relies on an ultrasound of the applicant's right shoulder done April 16, 2018, some ten months after the accident and more than one year before his assessment. Dr. Dessouki has no other diagnostic testing to compare this to so his conclusion that this tear is accident-related is unsupported. The partial tear is a minor injury as the MIG specifically states. Secondly, Dr. Dessouki discusses the applicant's pre-accident routine of going to work when in fact she had been off work for months pre-accident.

[13] Based on the totality of the medical evidence, I find that the applicant has failed to meet her burden of establishing that she had anything other than predominantly sprain and strain type physical injuries from the accident. These fall within the definition of "minor injury". However, the applicant argues that pre-existing conditions remove her from the MIG.

Did the applicant have a pre-existing medical condition that would remove her from the MIG?

[14] The applicant argues that her pre-existing shoulder tear, vertigo, depression, anxiety, diabetes and pre-accident recent abdominal surgery take her out of the MIG.

[15] The respondent concedes that the applicant had a pre-existing psychological impairment which may have been exacerbated by the accident but argues that the question is whether her psychological impairment was significant enough to take the applicant out of the MIG because it interfered with her physical or psychological treatment.

[16] I agree that this is the question. Section 18 (2) of the *Schedule* provides that the $3,500.00 limit does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health

practitioner before the accident *and* that it will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the $3,500.00 limit or is limited to the goods and services under the MIG. This is a two-part test. The respondent has conceded the first part of the test.

[17] I find that the applicant has not satisfied the second part of the test on a balance of probabilities. The applicant's history of depression and anxiety is well-documented. Starting in 2014, Dr. Barker diagnoses and prescribes medication for anxiety and depression which he often links to the applicant's family and work issues. In May 2017, Dr. Barker refers the applicant to psychiatry, prescribes medication and extends her time off work to August 29, 2017. Dr. Barker reports to her employer's disability plan holder ("OMERS") that the applicant has depression and anxiety and last worked on November 27, 2016. Dr. Barker on September 28, 2017 diagnosed emotional issues, post traumatic. However, around that time, the applicant was already receiving counselling through her work. Dr. Barker recorded on August 21, 2017, that the applicant has been getting counselling but "work is suggesting a new psychologist". Dr. Barker's records show that the applicant is generally compliant with her treatment.

[18] Dr. Coutts, the applicant's psychologist, confirms in her report dated October 3, 2017 that the applicant is receiving therapy and that when the applicant attends a session she is on time and participative. Dr. Coutts also comments that although the applicant has been diagnosed with recurrent depression, the symptoms of depression are not clearly observed in therapy. There is no evidence from either Dr. Barker or Dr. Coutts that establishes her pre-existing psychological impairment is significant enough to prevent her from achieving maximal recovery from her minor injuries.

[19] The respondent required the applicant to undergo a s. 44 insurer examination by Dr. Challis, psychologist, on August 22, 2019. This is the most comprehensive recent report on the applicant's psychological condition and recovery. Dr. Challis reviewed 335 records and reports about the applicant, assessed her in person and administered psychological questionnaires. Dr. Challis records that the applicant told him she had some challenges associated with depression to such an extent that she was off work for a period of time a number of years ago but has previously undergone counselling to aid her in managing her symptoms which she found beneficial and is currently taking medications that aid her anxiety and she is back at work. Dr. Challis's summary is that "she continues to report ongoing physical and emotional reactivity associated with the accident although not significantly impairing or disabling physical or psychological symptoms From a strictly psychological perspective, while (the applicant)

presents with some ongoing symptoms associated with depressive and anxious reactivity, they are not present to an extent so as to achieve diagnostic threshold….As Ms. McLuhan does not meet criteria for a psychological diagnosis in relation to the subject accident, no mental health interventions are required."

[20] I therefore find there is insufficient medical evidence before me that establishes that the applicant's pre-existing psychological impairment is significant enough to prevent her from achieving maximal recovery from her minor injuries.

[21] I also find that none of the applicant's other alleged medical conditions take her out of the MIG. There is insufficient medical evidence before me that establishes that any pre-existing shoulder tear, vertigo, diabetes or pre-accident abdominal surgery are significant enough to prevent her from achieving maximal recovery from her minor injuries. Her surgery was in February 2017. She was discharged from the hospital after a few days and healed reasonably well according to the records. The applicant's medical conditions are reasonably well managed by her physicians and there is insufficient evidence that any of them pose a significant barrier to her recovery.

[22] I therefore find the applicant has not met her burden of proof. There is insufficient medical evidence before me that establishes the applicant should not be subject to the MIG because of any pre-existing medical condition.

Medical Benefit: Are the treatment plans reasonable and necessary?

[23] The applicant argues that the respondent's Explanation of Benefits ("EOB") dated September 8, 2017 regarding the treatment plan submitted for physiotherapy at a cost of $1,349.00 is insufficient, unclear and lacking detail as required by s. 38 (8) of the *Schedule*. The sufficiency of this EOB is not relevant to this hearing as the $1,349.00 treatment plan was withdrawn by the applicant according to the Tribunal's case conference Order.

[24] Having found that the applicant has not proven on a balance of probabilities that he has a condition that would remove her from the MIG, I do not need to consider further whether the treatment plans in dispute are reasonable and necessary.

Interest

[25] As no benefits are payable, no interest is payable.

Special Award

[26] Section 10 of Ontario Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments. As there are no benefits payable, the respondent has not unreasonably withheld or delayed the payment of benefits. Therefore, there is no special award under Ontario Regulation 664.

ORDER

[27] For the reasons outlined above, I find that the applicant's injuries are predominantly minor injuries that fall within the MIG as defined by the *Schedule.* As no benefits are payable, no interest is payable. There is no special award. The applicant's claim is dismissed.

Released: July 29, 2020

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Avril A. Farlam
Vice Chair